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IN THE

Supreme Court of the United States

October Term, 1966

No. 1355

JEROME L. DOFF, *et al.*,

Petitioner,

vs.

BRUNSWICK CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 372 F. 2d 801 (1967). A copy of the opinion is attached to the petition as Appendix "A."

Jurisdiction.

Jurisdiction is based upon diversity and upon 28 USCA 1254(1).

Question Presented.

Whether there was any failure by the United States Court of Appeals for the Ninth Circuit to read, consider or understand an affidavit and the brief of Pe-

titioner on appeal taken from summary judgment, and whether any denial of due process under Amendment V, Constitution of the United States occurred.

Constitutional Provisions.

Amendment V, Constitution of the United States, is set forth on page 2 of the petition.

Statement of the Case.

The statement of the case submitted by Petitioners goes beyond the record and is incomplete and inaccurate. The following statement is therefore necessary.

This action is upon a written guarantee executed by Petitioners to cover loans to Transa Structures, Inc. ("Transa"). The guarantee and the remaining essential facts were admitted by Petitioners' failure to respond to a request for admissions filed under Rule 36 of the Rules of Civil Procedure. [Tr. pp. 44, 45, Tr. Index p. 2 Clk. Cert.] On the basis of these admissions and after consideration of supporting affidavits filed by Respondent and a single affidavit of Petitioner Jerome Doff [Tr. p. 311] the trial court granted Respondent's motion for summary judgment. The Petitioners thereafter, on September 25, 1964, filed a request for reconsideration and a second affidavit of Petitioner Jerome Doff. [Tr. p. 342.] Reconsideration was denied. The judgment was affirmed on appeal and a petition for rehearing was denied.

Basically the petition is limited to an assertion that the Court of Appeals did not read or did not understand Pe-

titioners' latter two affidavits. These two affidavits, in effect sought to establish that Respondent breached its obligation to Transa under the loan agreement between them by not loaning an additional $130,000.00 prior to Transa's default under the loan agreement on May 15, 1962. Contrary to Petitioners' assertion, the two affidavits were fully considered by the Court of Appeals and were ineffective because:

(a) The record was clear that Respondent had no obligation to make the further loan since Transa only assigned 9 of the 30 "California Contracts" required to be assigned [Tr. p. 258, lines 10-23] under the provision of the loan agreement that:

> "In any event all of the foregoing contracts shall be assigned to Brunswick or to such other lender prior to May 15, 1962 as security for all loans hereunder." [Tr. p. 128.]

And because it affirmatively appeared that the affidavits filed by Petitioners failed to comply with the standards prescribed by Rule 56(e) of the Federal Rules of Civil Procedure. (*Doff v. Brunswick Corporation*, 372 F. 2d 801, 804; Pet. App. p. 5)

(b) It was admitted that subsequent to May 15, 1962, and subsequent to any claimed default by Respondent, additional loans were made to Transa on July 20, 1962 [Tr. pp. 26, 46, line 12], September 28, 1962 [Tr. pp. 28, 46, line 15], and October 22, 1962 [Tr. pp. 30, 46, line 18], on the

basis of written instruments signed by Petitioners in which they requested the new loans; acknowledged Respondent's full performance under the loan agreement, reaffirmed their guaranty of the loans then and theretofore made, acknowledged earlier defaults by Transa, and waived any defense under their guaranty. [Tr. pp. 49, 55, 62, 67, 74, 81, 85].

It is accordingly clear that:

1. No obligation on the part of Respondent to make additional loans existed since all of the "California Contracts" had not been assigned "prior to May 15, 1962." The failure to so assign was affirmatively established by Respondent's affidavits [Tr. p. 258, lines 10-23] and it is even now stated by Petitioners' (Pet. p. 4) that only a "portion of the sums to become due upon the California Contracts" had been assigned. Petitioners' belated reliance upon Jerome Doff's affidavit that he "personally" requested Respondent to advance these additional funds prior to May 15, 1962 (Pet. p. 9) neither eliminated the condition precedent nor could have been effective for any purpose under a contract requiring performance by Transa.

2. The "understanding" of Jerome Doff, expressed in his affidavit [Tr. p. 313, lines 6-12], was no evidence that the condition percedent had been performed by Transa since he admittedly had

"no personal knowledge of the facts" during the months of March, April, May and June, 1962. [Tr. p. 342, line 19].

3. Regardless of all that Petitioners have said, they cannot avoid, and have made no attempt to avoid, the conclusive fact that they, on at least three occasions following the alleged default by Respondent, importuned Respondent to make further loans to Transa and upon the making of these subsequent loans documented their request, their reaffirmation of the guaranty, their acknowledgment of default by Transa and their waiver of any defenses under the guaranty. [Tr. p. 45, lines 2-30; Tr. pp. 49, 55, 62, 67, 74, 81, 85.]

It is crystal clear from the opinion of the Court of Appeals that it painstakingly reviewed the claimed defenses of Petitioners and correctly found them to be factually and legally insufficient.

ARGUMENT.

Petitioners' Assertion That the Court of Appeals Did Not Read or Consider Their Evidence Is Factually False and Legally Insufficient.

With typical obliqueness petitioners do not attempt to demonstrate error in the judgment of the trial court or in its affirmance by the Court of Appeals. Instead, they are content with the unsupportable assertion that there was on the part of the appellate court a "failure to read or reasonably understand" the "written evidence" presented by Petitioners to the trial court. (Pet. p. 2.) The "written evidence" on which Petitioners rely is limited to the two affidavits of Petitioner Jerome Doff. [Tr. p. 311 and p. 342.] Both are referred to at length in the Court of Appeals opinion. References to them are found in four paragraphs of the opinion and excerpts therefrom are found in three footnotes. These references clearly show that the court understood both the virtues and the frailties of the affidavits. In short the Court of Appeals did more than an appellate court is strictly required to do.

There was ample evidence in the record to support the District Court's findings. In addition to its supporting affidavit showing Transa's default prior to May 15, 1962, Respondent's evidence showed Petitioners to have thereafter admitted Respondent's full performance under the loan agreement; to have repeatedly affirmed the guaranty; to have repeatedly waived all defenses under the guarantee, and to have admitted Transa's default. The Court of Appeals liberally construed Petitioners' counter-affidavits but held them to be totally inadequate.

The Court of Appeals clearly established that Petitioners' counter-affidavits were required to show more than demand made prior to May 15 in order to demonstrate the survival of a genuine issue. It held that Respondent was not required to submit more proof than that already in the record with respect to mere hypothetical defenses which had been raised by neither the pleadings nor counter-affidavits.

Petitioners' contention that there was a breach by Respondent prior to default by Transa was presented and considered by:

(a) The trial court on motion for summary judgment;

(b) The trial court on the request for reconsideration;

(c) The Court of Appeals on the appeal; and

(d) The Court of Appeals on the petition for rehearing.

Thus, Petitioners have had their full opportunity to present every available defense and there was no lack of due process.

The cases relied upon by Petitioners cannot be helpful to their position. *Morgan v. United States,* 298 U.S. 468, involved a ruling made by a secretary of agriculture who had neither heard the evidence nor conducted the hearing at which it was received. *National Labor Relations Board v. Botany Worsted Mills,* 106 F. 2d 263, denied a petitioner's request for an order permitting interrogatories to members of the Board for the purpose of determining the reasoning upon which their judgment was based. The Court of Appeals in denying the request adhered to the settled rule that the reasoning

process used in arriving at a decision is not subject to any due process inquiry.

There was here no denial of due process. *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Owens v. Battenfield*, 33 F. 2d 753, 757 (8th Cir. 1929), cert. denied 280 U.S. 605 (1929); *Willis v. Scott*, 40 F. 2d 330, 333 (10th Cir. 1930), cert. denied 282 U.S. 877 (1930).

Conclusion.

Petitioners were capably represented by counsel throughout proceedings held before the District Court and had the assistance of counsel on at least one brief filed with the Court of Appeals (Pet. for Rehearing p. 5). Moreover, Petitioner Jerome L. Doff is a member of the State Bar of California. [Tr. p. 220.] The petition shows no conflict of decision among courts of appeals nor does it raise or demonstrate the existence of an important question of federal law. The opinion of the Court of Appeals refutes the assertion that it failed to read any evidence or give consideration to any argument. The petition and the record are totally devoid of any showing of due process violation. The petition should be denied.

Respectfully submitted,

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